No. 88-1458

Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

J. ALFRED RIDER, M.D.,
Petitioner,

VS.

UNITED STATES POSTAL SERVICE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

GREGORY P. EINHORN*
JOHN D. O'CONNOR
TARKINGTON, O'CONNOR & O'NEILL
A Professional Corporation
One Market Plaza
Spear Street Tower, 41st Floor
San Francisco, CA 94105

Attorneys for Petitioner J. Alfred Rider, M.D.

* *Counsel of Record*

QUESTION FOR REVIEW

Is affirmative misconduct required for the United States Postal Service to be held liable for breaching its promise to deliver time-sensitive political matter within forty-eight hours?

PARTIES TO PROCEEDING TO BE REVIEWED

The parties to the proceeding to be reviewed are petitioner J. Alfred Rider, M.D., and respondent, The United States Postal Service.

TABLE OF CONTENTS

Page

I

Background and Jurisdiction 1

II

Statement of the Case 2

III

Argument 2

TABLE OF AUTHORITIES CITED

Cases

Azar v. U.S. Postal Service, 777 F.2d 1265 (7th Cir. 1985) 2

Franchise Tax Bd. v. U.S. Postal Service, 467 U.S. 512 (1984) 3

Loeffler v. Frank, ____ U.S. ____, 108 S. Ct. 1965, 100 L.Ed.2d 549 (1988) 3

Wagner v. Director, Fed. Emergency Management Agency, 847 F.2d 515 (9th Cir. 1988) 2

Codes

39 U.S.C. Section 409(a) 2

Rules

Supreme Court Rule 17.1(d) 1

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

I

BACKGROUND AND JURISDICTION

This Petition for Certiorari involves the Ninth Circuit Court of Appeals opinion in the matter entitled *J. Alfred Rider, M.D., v. United States Postal Service,* 862 F.2d 239 (9th Cir. 1988), slip opinion filed December 5, 1988, No. 87-2622.

This Petition for Writ of Certiorari is brought pursuant to the Supreme Court's jurisdiction under Supreme Court Rule 17.1(d) to review decisions of federal courts of appeal in conflict with other federal courts of appeal.

The Ninth Circuit's opinion in this matter was filed on December 5, 1988.

II

STATEMENT OF THE CASE

A Postal Service employee promised Dr. Rider that political materials that Dr. Rider wanted to send by mail would be delivered within forty-eight hours. In reliance on this promise Dr. Rider paid $34,200.00 to have the materials delivered. Some of the materials were not delivered within forty-eight hours. These materials lost their value because they were not delivered until during or after the election to which they pertained.

Dr. Rider filed a complaint in the United States District Court for the Northern District of California, which had jurisdiction of the matter pursuant to 39 U.S.C. section 409(a). The District Court dismissed the complaint for failure to state a claim. Dr. Rider appealed, and the Ninth Circuit affirmed the dismissal.

III

ARGUMENT

The Ninth Circuit requires the presence of "affirmative misconduct going beyond mere negligence" before the federal government may be estopped from denying the authority of its employees to guarantee the time of delivery of mail. *Rider v. U.S. Postal Service,* 862 F.2d 239, (9th Cir. 1988); *Wagner v. Director, Fed. Emergency Management Agency,* 847 F.2d 515, 519 (9th Cir. 1988).

The Ninth Circuit's requirement of affirmative misconduct to support estoppel in these circumstances conflicts with the holding of the Seventh Circuit in *Azar v. United States Postal Service,* 777 F.2d 1265 (7th Cir. 1985).

The Ninth Circuit's decision below also conflicts with two decisions of this Court which broadly construe the "sue and be sued" clause of the Postal Reorganization Act: *Franchise Tax Bd. v. United States Postal Service,* 467 U.S. 512 (1984), and *Loeffler v. Frank,* ____ U.S. ____, 108 S. Ct. (1965), 100 L.Ed.2d 549 (1988).

Respectfully submitted,

TARKINGTON, O'CONNOR & O'NEILL

By: GREGORY P. EINHORN
Attorneys for Petitioner
J. Alfred Rider, M.D.

Appendix A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

J. ALFRED RIDER, M.D.,
Plaintiff-Appellant,

v.

UNITED STATES POSTAL SERVICE, an Executive Agency of the United States; UNITED STATES OF AMERICA,
Defendants-Appellees.

No. 87-2622
D.C. No. CV-86-7180-EFL
OPINION

Appeal from the United States District Court
for the Northern District of California
Eugene F. Lynch, District Judge, Presiding

Argued and Submitted
September 15, 1988—San Francisco, California

Filed December 5, 1988

Before: John M. Wisdom*, Robert Boochever and David R. Thompson, Circuit Judges.

Opinion by Judge Boochever

SUMMARY

Courts and Procedure/Contracts

Affirming the dismissal of a complaint for failure to state a

*Honorable John M. Wisdom, United States Circuit Judge for the Fifth Circuit, sitting by designation.

claim, the court held that a Post Office employee's oral representations concerning delivery of third class mail did not rise to the level of affirmative misconduct.

A Postal Service employee promised appellant Dr. Rider that political materials that Dr. Rider wanted to send by third class bulk mail would be delivered within forty-eight hours. In reliance on this promise Dr. Rider paid $34,200 to have the materials delivered. Some of the materials were not delivered within forty-eight hours. These materials lost their value because they were not delivered until during or after the election to which they pertained.

[1] Postal employees do not have actual authority to guarantee the time of delivery of third class mail. Unless the Postal Service is estopped from denying the authority of its employee to bind the Postal Service, Dr. Rider can prove no set of facts which would entitle him to relief. [2] Because Dr. Rider does not claim that the government conduct in this case is more serious than an incorrect oral representation, this is not an appropriate case for estoppel.

COUNSEL

John D. O'Connor and Patrick J. Hogan, Tarkington, O'Connor & O'Neill, P.C., San Francisco, California, for the plaintiff-appellant.

George Chris Stoll, Assistant United States Attorney, San Francisco, California, for the defendants-appellees.

OPINION

BOOCHEVER, Circuit Judge:

This appeal involves a claim against the United States Postal Service for failure to deliver third class mail within the

time promised by a Postal Service employee. We affirm the dismissal because under the facts as alleged in the complaint the Postal Service cannot be estopped from denying the authority of the employee to make the representations.

Dr. Rider appeals from the dismissal of his complaint for failure to state a claim. We review such a dismissal de novo. *Western Reserve Oil & Gas Co. v. New*, 765 F.2d 1428, 1430 (9th Cir. 1985), *cert. denied*, 474 U.S. 1056 (1986). "To affirm this type of dismissal, it must appear to a certainty that the plaintiff would not be entitled to relief under any set of facts that could be proved. All allegations of material fact are taken as true and construed in the light most favorable to the non-moving party." *Id.* (citations omitted). Thus, we assume the following allegations are true.

A Postal Service employee promised Dr. Rider that political materials that Dr. Rider wanted to send by third-class bulk mail would be delivered within forty-eight hours. In reliance on this promise Dr. Rider paid $34,200.00 to have the materials delivered. Some of the materials were not delivered within forty-eight hours. These materials lost their value because they were not delivered until during or after the election to which they pertained.

DISCUSSION

[1] All of Dr. Rider's claims stem from this alleged breach of contract. Under the relevant postal regulations postal employees do not have actual authority to guarantee the time of delivery of third class mail. Thus, unless the Postal Service is estopped from denying the authority of its employee to bind the Postal Service, Dr. Rider can prove no set of facts which would entitle him to relief.

The federal government may not be estopped on the same terms as other litigants. *Heckler v. Community Health Serv., Inc.*, 467 U.S. 51, 60 (1984). In addition to the traditional

requirements for estoppel, this Circuit requires a showing of "affirmative misconduct going beyond mere negligence." *E.g., Wagner v. Director, Fed. Emergency Management Agency*, 847 F.2d 515, 519 (9th Cir. 1988). "Furthermore, estoppel will apply only where the government's wrongful act will cause a serious injustice, and the public's interest will not suffer undue damage by imposition of the liability." *Morgan v. Heckler*, 779 F.2d 544, 545 (9th Cir. 1985).

The conduct in this case is not more egregious than in many cases in which no affirmative misconduct has been found. For example, in *Montana v. Kennedy*, 366 U.S. 308 (1961), the petitioner contended that the government was estopped from denying him citizenship on the basis of his foreign birth. The Court found that a government official's erroneous statement that the petitioner's mother could not return to the United States because she was pregnant "falls far short of misconduct such as might prevent the United States from relying on petitioner's foreign birth." *Id.* at 314-15; *see also INS v. Miranda*, 459 U.S. 14, 17 (1982).

In *Schweiker v. Hansen*, 450 U.S. 785, 788-89 (1981), Hansen met with Connelly, a Social Security Administration field representative, and asked him whether she was entitled to benefits. He erroneously informed her she was not, and contrary to an internal administration handbook failed to advise her to file a written application. As a result, she was unable to recover benefits to which she would otherwise have been entitled. 450 U.S. at 786. The Court held that "Connelly's errors 'fal[l] far short' of conduct which would raise a serious question whether petitioner is estopped from insisting upon compliance with the valid regulation." *Id.* at 790 (quoting *Montana v. Kennedy*, 366 U.S. at 314).

In *Lavin v. Marsh*, 644 F.2d 1378 (9th Cir. 1981) we held that even though Lavin was induced to join the Army Reserve by recruiters' erroneous representations that he would be entitled to pension benefits, these representations did not

constitute affirmative misconduct. *Id.* at 1383-84. We stated that there was "no suggestion that the recruiters deliberately and knowingly lied about Lavin's eligibility for pension benefits." *Id.* at 1382. We also noted that there was "no pervasive pattern of false promises" but rather "a failure on the part of the Army to determine clearly Lavin's pension eligibility status or to counteract any misunderstanding." *Id.* at 1383-84.

Finally, in *Mukherjee v. INS*, 793 F.2d 1006 (9th Cir. 1986) we held that an erroneous representation by a consular official did not amount to affirmative misconduct:

> [A]s a matter of law the government's actions in this case fall short of the affirmative misconduct necessary for estoppel. Nothing in the present case indicates a deliberate lie by the vice consul or a pattern of false promises. The vice consul here apparently mistakenly believed that Mukherjee was exempt from the two-year requirement, [and] told him so . . . .

Id. at 1009.

[2] A simple misstatement is not affirmative misconduct. The fact that the incorrect information is given orally makes it even less likely to rise to the level of affirmative misconduct. The reason for treating oral misinformation differently is given in *Heckler v. Community Health Serv., Inc.* 467 U.S. at 65:

> Written advice, like a written judicial opinion, requires its author to reflect about the nature of the advice that is given to the citizen, and subjects that advice to the possibility of review, criticism, and reexamination. The necessity for ensuring that governmental agents stay within the lawful scope of their authority, and that those who seek public funds

> act with scrupulous exactitude, argues strongly for the conclusion that an estoppel cannot be erected on the basis of the oral advice that underlay respondent's cost reports.

Dr. Rider does not claim that the government conduct in this case is more serious than an incorrect oral representation. Thus, this is not an appropriate case for estoppel.

The Seventh Circuit cases cited by Dr. Rider do not lead us to a different conclusion. In *Portmann v. United States*, 674 F.2d 1155 (7th Cir. 1982) the court held that the district court was incorrect in holding that as a matter of law the Postal Service could not be estopped by an employee's misstatements in connection with Express Mail service. The court quoted the requirements for estoppel against the government as stated by the Ninth Circuit in *TRW, Inc. v. FTC*, 647 F.2d 942, 950-51 (9th Cir. 1981), including affirmative misconduct, and remanded to the district court for a determination whether the Postal Service could be estopped under the applicable standard.

The Ninth Circuit treats affirmative misconduct as an essential requirement. *See, e.g., Wagner*, 847 F.2d at 519 ("A party seeking to raise estoppel against the government *must* establish 'affirmative misconduct going beyond mere negligence' " (emphasis added) (quoting *Morgan v. Heckler*, 779 F.2d 544, 545 (9th Cir. 1985))). Furthermore, the requirement of affirmative misconduct appears to be mandated by *Schweiker v. Hansen*, 450 U.S. at 785 and *INS v. Miranda*, 459 U.S. at 14. In both cases the Court refused to decide whether estoppel against the government would ever be appropriate, but held that in the absence of affirmative misconduct there could be no estoppel. *See Hansen*, 450 U.S. at 788-89; *Miranda*, 459 U.S. at 17-19.

In *Azar v. United States Postal Serv., Inc.*, 777 F.2d 1265 (7th Cir. 1985), the court upheld a district court finding that

under the unique facts of that case, the Postal Service could appropriately be estopped by employees' misstatements. The court held that "affirmative misconduct is not a requirement in the unique situation in which a party seeks to estop the Postal Service from relying on Express Mail insurance limits." *Id.* at 1271. This holding was based in part on a distinction between the government acting in a proprietary function as opposed to a sovereign function, and in part on a finding that "Congress has manifested its intent, acknowledged by the Supreme Court in *Franchise Tax Bd. v. United States Postal Serv., Inc.*, 467 U.S. 512 (1984) and by [the Seventh Circuit] in *Portmann*, 674 F.2d at 1168, to create in the Postal Service a nearly self-sustaining enterprise competitive with other commercial ventures." *Azar*, 777 F.2d at 1271.

We have rejected the distinction between sovereign and proprietary functions in deciding whether estoppel should apply. *See Wagner*, 847 F.2d at 519. The principle stated in *Franchise Tax Board* and relied on in *Azar* that "we must presume that the Service's liability is the same as that of any other business," *Azar*, 777 F.2d at 1271, does not lead to the conclusion that Congress intended the doctrine of estoppel to apply to the Postal Service as it does to a private business. That holding referred to the extent of the waiver of sovereign immunity in the "sue-and-be-sued" clause of 39 U.S.C. § 401(1). That section provides that the Postal Service may "sue and be sued in its official name." That is separate from the question of the substantive doctrine of estoppel against the government, although the doctrine of estoppel is related to the doctrine of sovereign immunity. *See, e.g., Portmann*, 674 F.2d at 1159.

Furthermore, while the "sue-and-be-sued" clause is a broad waiver of sovereign immunity, Congress has retained immunity for the Postal Service from tort claims "arising out of the loss, miscarriage, or negligent transmission of letters and postal matter." 28 U.S.C. § 2680(b); *see* 39 U.S.C. 409(c); *Anderson v. United States Postal Service*, 761 F.2d 527, 528

(9th Cir. 1985). This substantial retention of sovereign immunity adds support to our holding that the Postal Service is not estopped on the same basis as private businesses in cases involving late delivery of mail.

CONCLUSION

Because the government conduct that Dr. Rider claims occurred does not rise to the level of affirmative misconduct, we hold that his complaint was properly dismissed.

AFFIRMED

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In the Supreme Court of the United States

OCTOBER TERM, 1988

J. ALFRED RIDER, PETITIONER

v.

UNITED STATES POSTAL SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

WILLIAM C. BRYSON
Solicitor General
JOHN R. BOLTON
Assistant Attorney General
MICHAEL JAY SINGER
GREGORY C. SISK
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the United States Postal Service may be held liable on estoppel grounds because a Postal Service employee made an unauthorized oral promise that third-class mail would be delivered within a specified time, notwithstanding a regulation providing that the time of delivery of third-class mail is not guaranteed.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	2
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Allied Coin Investment, Inc. v. *United States Postal Service*, 673 F. Supp. 982 (D. Minn. 1987) 9

Anderson v. *United States Postal Service*, 761 F.2d 527 (9th Cir. 1985) 8

Azar v. *United States Postal Service*, 777 F.2d 1265 (7th Cir. 1985) 4, 5

Automobile Club v. *Commissioner*, 353 U.S. 180 (1957) .. 4

Birnbaum v. *United States*, 436 F. Supp. 967 (E.D.N.Y. 1977), aff'd in part and rev'd in part, 588 F.2d 319 (2d Cir. 1978) 9

Crown v. *United States Railroad Retirement Bd.*, 811 F.2d 1017 (7th Cir. 1987) 4

Franchise Tax Board v. *United States Postal Service*, 467 U.S. 512 (1984) 7-8

Federal Crop Ins. Corp. v. *Merrill*, 332 U.S. 380 (1947) .. 3-4

Gibbons v. *United States*, 75 U.S. (8 Wall.) 269 (1868) ... 3

Hart v. *United States*, 95 U.S. 316 (1877) 3

Heckler v. *Community Health Services, Inc.*, 467 U.S. 51 (1984) 3, 4, 6

INS v. *Hibi*, 414 U.S. 5 (1973) 4

INS v. *Miranda*, 459 U.S. 14 (1982) 4

Insurance Co. v. *United States Postal Service*, 675 F.2d 756 (5th Cir. 1982) 8

Lee v. *Munroe & Thornton*, 11 U.S. (7 Cranch) 366 (1813) 3

Loeffler v. *Frank*, No. 86-1431 (June 13, 1988) 8

Cases—Continued: Page

Morgan v. *Heckler*, 779 F.2d 544 (9th Cir. 1985) 7
Montana v. *Kennedy*, 366 U.S. 308 (1961) 4
Pine River Logging Co. v. *United States*, 186 U.S. 279 (1902) 3
Portmann v. *United States*, 674 F.2d 1155 (7th Cir. 1982) 4, 5, 6
Rider v. *United States*, 7 Cl. Ct. 770 (1985) 3, 7, 8
Schweiker v. *Hansen*, 450 U.S. 785 (1981) 3, 4, 7
Sportique Fashions, Inc. v. *Sullivan*, 597 F.2d 664 (9th Cir. 1979) 8-9
TRW, Inc. v. *Federal Trade Commission*, 647 F.2d 942 (9th Cir. 1981) 6
United States v. *Stewart*, 311 U.S. 60 (1940) 3
United States Postal Service v. *Council of Greenburgh Civic Ass'ns*, 453 U.S. 114 (1981) 5
Utah v. *United States*, 284 U.S. 534 (1932) 3
Utah Power & Light Co. v. *United States*, 243 U.S. 389 (1917) 3
Wagner v. *Director, Federal Emergency Management Agency*, 847 F.2d 515 (9th Cir. 1988) 5
Wilber Nat'l Bank v. *United States*, 294 U.S. 120 (1935) .. 3

Statutes and regulations:

Contract Disputes Act of 1978, 41 U.S.C. 601 *et seq.* 7
18 U.S.C. 1693-1697 5
28 U.S.C. 2680(b) 8, 9
39 U.S.C. 401(1) 2
39 U.S.C. 601-606 5
44 U.S.C. 1507 3
39 C.F.R.:
Section 111.1 3
Sections 310-320 5

Miscellaneous:

Domestic Mail Manual (1987) 2, 3
Note, *Unauthorized Conduct of Government Agents: A Restrictive Rule of Equitable Estoppel Against the Government*, 53 U. Chi. L. Rev. 1027 (1986) 6

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J. ALFRED RIDER, PETITIONER

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UNITED STATES POSTAL SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A8) is reported at 862 F.2d 239. The district court's order and judgment are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 5, 1988. The petition for a writ of certiorari was filed on March 4, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner contends that he requested expeditious delivery of election materials by third-class bulk rate mail, that he was given an oral promise by an unnamed Postal Service employee that the materials would be delivered within 48 hours, that he paid $34,200 postage in reliance

on the employee's promise, and that some of the materials were not delivered within 48 hours. Pet. App. A3. The applicable Postal Service regulation provides that the delivery of third-class mail within a specified time is not guaranteed. Domestic Mail Manual (DMM) § 630 (1987); Pet. App. A3.

2. Petitioner filed contractual and quasi-contractual claims in district court. In a summary order without opinion, the district court dismissed the complaint for failure to state a claim. The United States Court of Appeals for the Ninth Circuit affirmed on the basis that "under the facts as alleged in the complaint the Postal Service cannot be estopped from denying the authority of the employee to make the representations." Pet. App. A3. Relying upon the established principle that the federal government may not be estopped on the same terms as other litigants (*ibid.*), the court held there was no allegation in this case of the type of affirmative misconduct that might permit an estoppel of the Postal Service (Pet. App. A4-A6).

The court rejected petitioner's argument that estoppel should lie against the Postal Service because it was engaged in a proprietary enterprise, explaining that the Ninth Circuit has rejected the distinction between sovereign and proprietary functions in deciding whether estoppel applies against the government. Pet. App. A7. The court also held that the "sue-and-be-sued" clause of 39 U.S.C. 401(1), while waiving the sovereign immunity of the Postal Service, did not remove the "separate" protection of "the substantive doctrine of estoppel against the government." Pet. App. A7.

ARGUMENT

1. The court of appeals correctly refused to estop the Postal Service on the grounds that an unnamed postal

employee had made promises or guarantees concerning the time for delivery of third-class mail. According to regulation, expeditious delivery of third-class mail is not guaranteed.[1] Estoppel of the government cannot be premised on the actions of subordinate employees not delegated the authority to waive express regulatory provisions. *Federal Crop. Ins. Corp.* v. *Merrill*, 332 U.S. 380 (1947); *Schweiker* v. *Hansen*, 450 U.S. 785 (1981).

Indeed, this Court has questioned whether "estoppel can ever be appropriately applied against the Government" (*Heckler* v. *Community Health Services, Inc.*, 467 U.S. 51, 66 (1984)) and has never identified any case in which such an estoppel could properly lie.[2] Although the Court

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[1] DMM § 630 explicitly provides:

> Third-class mail may receive deferred service. The Postal Service does not guarantee the delivery of third-class mail within a specified time.

The DMM is issued periodically and is incorporated by reference into the Code of Federal Regulations. See 39 C.F.R. 111.1. Mailers and other postal customers are thus presumed to have notice of its contents. See 44 U.S.C. 1507.

Bulk rate third-class mail is typically the "medium of choice" for the economical distribution of circulars and other printed matter, not for the expeditious transmission of important business or personal correspondence. *Rider* v. *United States*, 7 Cl. Ct. 770, 773 (1985). More expeditious handling is given to Express Mail, first-class mail, and second-class publications. Express Mail is the *only* class of mail with a guaranteed time of delivery. *Rider*, 7 Cl. Ct. at 773.

[2] See, *e.g.*, *Lee* v. *Munroe & Thornton*, 11 U.S. (7 Cranch) 366 (1813); *Gibbons* v. *United States*, 75 U.S. (8 Wall.) 269, 274 (1868); *Hart* v. *United States*, 95 U.S. 316, 318-319 (1877); *Pine River Logging Co.* v. *United States*, 186 U.S. 279, 291 (1902); *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 408-409 (1917); *Utah* v. *United States*, 284 U.S. 534, 545-546 (1932); *Wilber Nat'l Bank* v. *United States*, 294 U.S. 120, 123-124 (1935); *United States* v. *Stewart*, 311 U.S. 60, 70 (1940); *Federal Crop Ins. Corp* v. *Merrill*, 332 U.S.

has reserved the question whether, in some circumstances, the government may be estopped by the "affirmative misconduct" of government employees (*Schweiker* v. *Hansen*, 450 U.S. 785, 788 (1981); *INS* v. *Hibi*, 414 U.S. 5, 8-9 (1973) (per curiam)), the mistaken oral representation by the employee here cannot be regarded as conduct even approaching the serious "affirmative misconduct" that may warrant an estoppel. See Pet. App. A4-A6.

Petitioner asserts, without any explanation or argument, that the court of appeals' decision conflicts with the holding of the Seventh Circuit in *Azar* v. *United States Postal Service*, 777 F.2d 1265 (1985). In both *Azar* and its earlier decision in *Portmann* v. *United States*, 674 F.2d 1155 (1982), the Seventh Circuit held that the government could be estopped "in the unique situation in which a party seeks to estop the Postal Service from relying on Express Mail insurance limits." *Azar*, 777 F.2d at 1271; see also *Portmann*, 674 F.2d at 1168-1169. The court emphasized "[t]he narrow reach of [its] holding" and focused upon the fact that the Express Mail service was in direct competition with private courier services. *Azar*, 777 F.2d at 1271; see also *Portmann*, 674 F.2d at 1169. The Seventh Circuit has subsequently affirmed that these decisions are limited to the specific context of the Postal Service's Express Mail service. *Crown* v. *United States Railroad Retirement Bd.*, 811 F.2d 1017, 1021 (1987).

Unlike Express Mail, the bulk rate third-class mail service at issue in this case is not a primarily commercial activity in direct competition with private delivery services. Indeed, addressed, third-class circulars are defined as "let-

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380 (1947); *Automobile Club* v. *Commissioner*, 353 U.S. 180, 183 (1957); *Montana* v. *Kennedy*, 366 U.S. 308, 314-315 (1961); *INS* v. *Hibi*, 414 U.S. 5, 8 (1973); *Schweiker* v. *Hansen*, 450 U.S. 785 (1981); *INS* v. *Miranda*, 459 U.S. 14 (1982); *Heckler* v. *Community Health Services, Inc.*, 467 U.S. 51 (1984).

ters" in postal regulations and may not legally be carried outside the mail without the payment of postage. 39 U.S.C. 601-606; 18 U.S.C. 1693-1697; 39 C.F.R. 310-320; see also *United States Postal Service* v. *Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 122 (1981) (referring to the longstanding "postal monopoly" created by these statutes).

In short, even had this case been decided under the Seventh Circuit's precedents, the Postal Service's activities here would not have been excepted from the general rule precluding estoppel of the government.[3]

2. In any event, "however heavy the burden might be when an estoppel is asserted against the Government, the private party surely cannot prevail without at least demonstrating that the traditional elements of an estoppel are present." *Heckler* v. *Community Health Services, Inc.*, 467 U.S. at 61. Although the court of appeals rested its decision on the conclusion that "affirmative misconduct" had not been shown, petitioner's claim could not pass muster even if made against a private defendant.

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[3] The Seventh Circuit, unlike the Ninth Circuit, has not firmly rejected any distinction between the government's "proprietary" and "sovereign" functions when considering estoppel claims against the government. Compare *Azar* v. *United States Postal Service*, 777 F.2d 1265, 1271 (7th Cir. 1985) (acknowledging distinction) and *Portmann* v. *United States*, 674 F.2d 1155, 1160-1162 (7th Cir. 1982) (identifying "proprietary" or commercial character of government activity as one factor to be considered when weighing estoppel claim against the government, though declining to give it dispositive weight) with Pet. App. A7 and *Wagner* v. *Director, Federal Emergency Management Agency*, 847 F.2d 515, 519 n.4 (9th Cir. 1988) (rejecting distinction). There is no indication, however, that the Seventh Circuit, or any other court of appeals, would have considered the governmental activity at issue here—the delivery of third-class bulk rate mail—to be "proprietary" in nature. Third class mail, which may not be carried legally outside the United States mail without payment of postage (see pages 4-5, *supra*), has no direct commercial competitor or counterpart.

Both the Seventh and Ninth Circuits have adopted the same standards for determining whether a traditional estoppel is stated:

> First, the party to be estopped must know the facts. Second, this party must intend that his conduct shall be acted upon, or must so act that the party asserting estoppel had a right to believe it is so intended. Third, the party asserting estoppel must have been ignorant of the facts. Finally, the party asserting estoppel must reasonably rely on the other's conduct to his substantial injury.

Portmann, 674 F.2d at 1167; *TRW, Inc.* v. *Federal Trade Commission,* 647 F.2d 942, 950-951 (9th Cir. 1981) (citations omitted). The elements of justifiable reliance and substantial injury are missing on the facts as alleged in this case.

First, a reasonable person would not expect to receive a guarantee that mail sent at an inexpensive third-class bulk rate would be expeditiously delivered. At the least, a reasonable person would not rely upon an oral promise of such delivery by an unnamed individual in these circumstances; he or she would surey insist on written documentation. See *Heckler* v. *Community Health Services, Inc.,* 467 U.S. at 65 (reliance on "official action that is not confirmed or evidenced by a written instrument" is inappropriate).[4]

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[4] Several factors, including the necessity of avoiding fraud and ensuring that government employees stay within the scope of their authority, "argue[] strongly for the conclusion that an estoppel cannot be erected on the basis of * * * oral advice." *Heckler* v. *Community Health Services, Inc.,* 467 U.S. at 65; see also Note, *Unauthorized Conduct of Government Agents: A Restrictive Rule of Equitable Estoppel Against the Government,* 53 U. Chi. L. Rev. 1026, 1030-1031 (1986) (decisions of this Court suggest that "reliance upon oral representations of government officials might be per se

Second, uncontrovered evidence submitted in an earlier proceeding in the Claims Court,[5] shows that, of the 431,967 circulars mailed by third-class, only about 1,300 were not delivered prior to election day. See *Rider* v. *United States,* 7 Cl. Ct. 770, 772 (1985). And even these mailings were delivered by 3:00 p.m. on election day. *Ibid.* Thus, it cannot be said that petitioner suffered any "substantial injury" justifying an estoppel.[6]

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unreasonable"). The oral nature of the transaction also makes it difficult to "ascertain[] what had actually been discussed and what information had been provided to the government representative during the short interview." *Morgan* v. *Heckler,* 779 F.2d 544, 546 (9th Cir. 1985) (citing *Schweiker* v. *Hansen,* 450 U.S. at 789). In *Schweiker* v. *Hansen,* this Court declined to base estoppel upon an oral interview "because of possibly erroneous replies to oral inquiries." 450 U.S. at 788. In this case, petitioner cannot even identify the Postal Service employee who allegedly made the promises he relied upon, thereby preventing the government from presenting any contravening evidence of the substance of the informal conversation. It may well be that petitioner is mistaken in his allegation or misunderstood the significance of a statement, perhaps confusing an estimate offered by the employee with a guarantee of the time of delivery.

[5] Petitioner originally filed breach of contract claims against the United States in the United States Claims Court. *Rider* v. *United States,* 7 Cl. Ct. 770 (1985). The Claims Court found that petitioner had failed to provide any documentary evidence showing that petitioner himself, as opposed to the political organization that held the third-class bulk rate permit, was a party to any contract with the Postal Service. *Id.* at 774. Moreover, the court held that it lacked jurisdiction to impose a "quasi-contractual" obligation on the Postal Service, and that the alleged contract was not cognizable under the Contract Disputes Act of 1978 (41 U.S.C. 601 *et seq.*). 7 Cl. Ct. at 774-775. The United States Court of Appeals for the Federal Circuit affirmed this grant of summary judgment in an unpublished decision. 790 F.2d 91 (Fed. Cir. 1986) (Table).

[6] Nor is the conclusion that estoppel is inappropriate affected in any way by the Postal Service's "sue-and-be-sued" clause. Contrary to petitioner's contention (Pet. 3), *Franchise Tax Board* v. *United States*

3. Finally, petitioner's complaint was properly dismissed for other independent reasons. To begin with, the Claims Court found on summary judgment that petitioner had failed to present any documentary evidence that he had any interest in the election circulars at issue. *Rider,* 7 Cl. Ct. at 774. The holder of the permit for third-class bulk rate mailing was not the petitioner, but an organization called "Citizens for Proposition M" (CPM). *Ibid.* Although petitioner claimed that he and CPM were "one and the same," the financial disclosures forms filed by CPM with the State of California did not mention petitioner as either an officer or a contributor to this organization. *Ibid.* Accordingly, as the Claims Court found, petitioner has not established that he was in privity of contract with the Postal Service. *Ibid.* That finding, upheld by the Federal Circuit, is entitled to collateral estoppel effect in this proceeding.

Moreover, petitioner's lawsuit, although framed as an action in contract, actually sounds in tort. As the court of appeals noted (Pet. App. A7-A8), while the "sue-and-be-sued" clause is a broad waiver of the Postal Service's sovereign immunity, Congress has specifically preserved immunity for the Postal Service from tort claims "arising out of the loss, miscarriage, or negligent transmission of letters and postal matter." 28 U.S.C. 2680(b).[7] Petitioner

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Postal Service, 467 U.S. 512 (1984), and *Loeffler* v. *Frank,* No. 86-1431 (June 13, 1988), concern only the obligations assumed by the Postal Service under its waiver of sovereign immunity; they do not concern the circumstances under which the Postal Service can be estopped from relying on its published regulations. See Pet. App. A7.

[7] See, *e.g., Anderson* v. *United States Postal Service,* 761 F.2d 527, 528 (9th Cir. 1985); *Insurance Co.* v. *United States Postal Service,* 675 F.2d 756, 758 (5th Cir. 1982); *Sportique Fashions, Inc.* v. *Sullivan,*

has attempted to plead his claim as one for breach of contract or quasi-contract, but the ultimate claim of liability remains misdelivery, which brings the case within the ambit of 28 U.S.C. 2680(b). *Allied Coin Investment, Inc.* v. *United States Postal Service,* 673 F. Supp. 982, 986-987 (D. Minn. 1987); see also *Sportique Fashions, Inc.* v. *Sullivan,* 597 F.2d 664, 667 (9th Cir. 1979). That Section is plainly designed "to bar actions for losses occasioned by the handling of goods within the postal system" (*Allied Coin,* 675 F. Supp. at 987) and thus precludes petitioner's claim, however pleaded or framed.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General

JOHN R. BOLTON
Assistant Attorney General

MICHAEL JAY SINGER
GREGORY C. SISK
Attorneys

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597 F.2d 664, 665 (9th Cir. 1979). "Congress was concerned with shielding the courts from the potential landslide of lawsuits that might be generated by the unavoidable mishaps incident to the ordinary, accepted operation of delivering millions of packages and letters each year." *Birnbaum* v. *United States,* 436 F. Supp. 967, 974 (E.D.N.Y. 1977), aff'd in part and rev'd in part, 588 F.2d 319 (2d Cir. 1978).

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